Kaseh Lebuhraya Sdn Bhd v Azam Developer & Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–24–105 OF 2007
KANG HWEE GEE J
6 AUGUST 2007

Companies and Corporations — Arrangement, scheme of — Arrangement between company and creditors — Ex parte application to court — Application for restraining order — Disclosure of all material facts — Whether existence of consent order should have been disclosed to court — Companies Act 1965 s 176(1), (10)

The applicant applied ex parte for and was granted orders under s 176(1) of the Companies Act 1965, which included a restraining order pursuant to s 176(10) of the Companies Act. Leave to intervene was granted to the intervener, Azam Developer & Construction Sdn Bhd ('Azam Developer'). Azam Developer filed an application to set aside the ex parte restraining order granted by the court to the applicant. The basis for Azam Developer's application to intervene is on the complaint that the scheme now proposed is essentially the same scheme that was proposed in the previous application before Court 5 which had lapsed because the Securities Commission had not approved it. In the present ex parte application, the applicant had failed to disclose the terms of the consent order involving a large sum of RM19.4m recorded in another court.

Held, allowing the application:

(1) By the time this intervener's application is heard, the ex parte order obtained by the applicant had lapsed thereby rendering it academic. It is nevertheless necessary to complete this judgment to send a message to aspiring future applicants under s 176 of the Companies Act 1965 that there is a duty on their part to disclose all material facts on clear and precise terms which may have a bearing on the decision of the court whether or not to grant a restraining order in the first place (see para 7).

(2) The applicant had made this application purely with the intention of avoiding its obligation to the intervener under the consent order. It is not enough merely to provide the court with a list of secured or unsecured creditors without disclosing its obligation under the consent order. By doing so the applicant is guilty of withholding crucial information without which a just decision cannot be made on an ex parte basis. The applicant's application was therefore clearly an abuse of the power of the court (see para 8).

(3) The affidavit of the general manager Mohd Khalid bin Mohamed supporting this application under s 176 did not specifically depose that the intervener was

a substantial creditor who had bound the company by a consent order of the High Court obliging it to pay the judgment debt and that the said High Court order prevented the applicant from encumbering the applicant's shares in LEKAS which constitutes all or substantially all of its assets without having first to settle the debt owed to the intervener under the terms of the consent order. The applicant has failed to disclose the importance of this consent order without which the court would not be able to consider the applicant's ex parte application under s 176 justly and effectively. Needless to say such an omission constitutes contempt which the deponent of the affidavit must be made to answer (see para 9).

[Bahasa Malaysia summary

Pemohon telah memohon ex parte dan memperolehi perintah-perintah di bawah s 176(a) Akta Syarikat 1965, yang mengandungi perintah sekatan menurut kepada s 176(10) Akta Syarikat. Kebenaran untuk mencelah telah diberikan kepada pencelah, Azam Developer & Construction Sdn Bhd (Pemaju Azam). Pemaju Azam telah memfailkan permohonan untuk mengenepikan perintah sekatan yang diberikan oleh mahkamah kepada pemohon. Asas kepada permohonan Pemaju Azam untuk mencelah adalah atas aduan bahawa skim yang dicadangkan pada dasarnya adalah sama dalam permohonan terdahulu di hadapan Mahkamah 5 yang telah pun luput kerana Suruhanjaya Sekuriti tidak mengesahkannya. Dalam permohonan ex parte sekarang, pemohon telah gagal mendedahkan terma-terma perintah persetujuan yang mengandungi jumlah sebanyak RM19.4j yang direkodkan dalam mahkamah yang satu lagi.

Diputuskan, membenarkan permohonan:

(1) Bila permohonan pencelah ini didengar, perintah ex parte yang diperolehi oleh pemohon telah pun luput menyebabkannya menjadi akademik. Walaupun begitu, ia adalah perlu untuk menyempurnakan penghakiman ini bagi menyampaikan mesej kepada pemohon-pemohon yang berhasrat di masa depan di bawah s 176 Akta Syarikat 1976 bahawa terdapat kewajipan di pihak mereka untuk mendedahkan kesemua fakta-fakta material dengan terma-terma yang jelas dan tepat yang akan dapat mempengaruhi keputusan mahkamah sama ada akan memberikan atau tidak perintah sekatan pada peringkat awalnya (lihat perenggan 7).

(2) Pemohon telah membuat permohonan ini semata-mata dengan niat bagi mengelakkan kewajipannya kepada pencelah di bawah perintah persetujuan. Ia tidak mencukupi dengan hanya menyediakan kepada mahkamah senarai pemiutang bercagar dan tidak bercagar tanpa mendedahkan kewajipannya di bawah perintah persetujuan. Dengan berbuat begitu pemohon adalah bersalah kerana menyimpan maklumat penting yang tanpanya keputusan adil tidak dapat dibuat atas dasar ex parte. Permohonan pemohon dengan itu adalah satu pencabulan kuasa mahkamah (lihat perenggan 8).

(3) Afidavit oleh pengurus besar Mohd Khalid bin Mohamed yang menyokong permohonan ini di bawah s 176 tidak secara spesifiknya mendeposkan bahawa

pencelah adalah pemiutang yang substansial yang telah mengikat syarikat dengan perintah persetujuan Mahkamah Tinggi yang mengarahkannya membayar hutang penghakiman dan perintah Mahkamah Tinggi tersebut menghalang pemohon daripada menyekat saham-saham pemohon dalam LEKAS yang meliputi keseluruhannya atau secara subtansial kesemua aset-asetnya tanpa terlebih dahulu menyelesaikan hutang yang terhutang kepada pencelah di bawah terma-terma perintah persetujuan. Pemohon telah gagal untuk mendedahkan kepentingan perintah ini yang tanpanya mahkamah tidak akan dapat mempertimbangkan permohonan ex parte pemohon secara adil dan efektif di bawah s 176. Tak perlu dikatakan bahawa peninggalan tersebut akan mengakibatkan penghinaan yang mana deponen afidavit dikehendaki menjawabnya (lihat perenggan 9).]

Notes

For a case on arrangement between company and creditors, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 36.

Cases referred to

Kuala Lumpur Industries Bhd & Ors, Re [1990] 2 MLJ 180 (refd)

Legislation referred to

Companies Act 1965 s 176(1), (10)

Zachary Ivan Scully (Ramesh with him) (Chellam Wong) for the applicant.
Chetan Lachman Jethwani (Kumar Partnership) for the proposed intervener/creditor.

Kang Hwee Gee J:

[1] This was an application by a creditor Azam Developer & Construction Sdn Bhd to set aside the ex parte restraining order granted by this court under s 176(10) of the Companies Act 1965.

[2] The restraining order was granted in the course of the hearing of the applicant's application under s 176(1) of the Act. The order read as follows:

1. Bahawa pemohon diberikan kebebasan untuk mengadakan mesyuarat pemiutang-pemiutang pemohon menurut s 176(1) Akta Syarikat 1965 ('Mesyuarat Pemiutang tersebut') untuk tujuan mengambil kira dan sekiranya dianggap sesuai, untuk meluluskan dengan atau tanpa modifikasi suatu cadangan skima penyusunan semula dan kompromi untuk pemohon ('skima tersebut') di mana butir-butir lanjut skima tersebut akan terkandung dalam suatu pernyataan penjelasan yang akan dikeluarkan selepas ini kepada kesemua pemiutang-pemiutang pemohon yang relevan di mana ringkasan skima tersebut adalah terkandung dalam afidavit Mohd Khalid bin Mohamed yang difailkan di dalam ini.
2. Bahawa mengenai Mesyuarat Pemiutang tersebut:
   2.1. Mesyuarat Pemiutang tersebut hendaklah diadakan dalam tempoh 90 hari dari tarikh perintah ini di antara pukul 9 pagi dan 5 petang;

2.2. Tertakluk kepada perenggan 2.1 di atas, bahawa pemohon diberikan kebebasan untuk menetapkan masa, tarikh dan tempat Mesyuarat Pemiutang tersebut hendaklah diadakan;

2.3. Mesyuarat Pemiutang tersebut disaman dengan memberikan notis tidak kurang daripada 21 hari dan bahawa notis tersebut diberikan:

(i) secara pos biasa kepada setiap pemiutang yang berhak untuk menerima notis tersebut; dan

(ii) secara pengiklanan sekali dalam dua (2) surat khabar harian tempatan.

2.4. bahawa satu pernyataan penjelasan menurut s 177(1)(a) Akta Syarikat 1965 diberikan kepada setiap pemiutang-pemiutang bersama dengan notis Mesyuarat Pemiutang tersebut yang dirujuk dalam perenggan 2.3 di atas;

2.5. bahawa pemiutang-pemiutang pemohon yang relevan dibenarkan untuk mendapatkan salinan-salinan pernyataan penjelasan daripada pejabat berdaftar pemohon iaitu di Tingkat 7, Menara Milenium, No 8, Jalan Damanlela, Damansara Heights, 50490 Kuala Lumpur pada bila-bila hari kerja di antara pukul 9 pagi hingga 5 petang kecuali hari cuti am, Sabtu dan Ahad.

3. Suatu perintah penghalangan dikeluarkan oleh Mahkamah Yang Mulia ini menurut s 176(10) Akta Syarikat 1965 untuk menghalang prosiding-prosiding lanjutan serta apa dan kesemua tindakan-tindakan atau prosiding-prosiding terhadap pemohon untuk tempoh masa 90 hari dari tarikh pemberian perintah ini kecuali dengan kebenaran Mahkamah dan tertakluk kepada terma-terma yang mahkamah ini memutuskan.

4. Bahawa mahkamah meluluskan Dato' Mohd Shahar bin Abdul Hamid (No K/P: 360616-10-5361) bertindak sebagai seorang pengarah pemohon untuk tujuan s 176(10A)(d) Akta Syarikat 1965;

5. Bahawa pemohon dikehendaki dalam tempoh masa tujuh (7) hari dari tarikh perintah ini;

5.1. menyerahsimpankan satu salinan pejabat perintah ini dengan Pendaftar Syarikat ('Registrar of Companies');

5.2. menerbitkan satu notis perintah ini sekali dalam suratkhabar *The Star* atau secara alternatif, dalam suratkhabar *The New Straits Times*;

6. Bahawa Dato' Mohd Shahar Bin Abdul Hamid (No K/P: 360616-10-5361) dan dalam ketiadaan beliau YAM. Tunku Naquiyuddin Ibni Tuanku Ja'afar (No K/P: 470308-05-5259) diarahkan mengerusi Mesyuarat Pemiutang tersebut;

7. Bahawa selepas tamatnya Mesyuarat Pemiutang tersebut, pemohon diarahkan untuk melaporkan keputusan Mesyuarat Pemiutang tersebut kepada mahkamah yang mulia ini; dan

8. Pemohon diberikan kebebasan untuk memohon.

[3] Leave to intervene had been granted earlier on 9 July 2007. The intervener's complaint is set out in para 28 of the supporting affidavit as follows:

28. The grounds of this application are broadly as follows:

(a) the Revised Proposed Restructuring Scheme is prejudicial to the position of Azam as secured creditor of Kaseh;

(b) the Revised Proposed Restructuring Scheme breaches the consent order;

(c) Kaseh is guilty of material non-disclosure when making this application;

(d) the Revised Proposed Restructuring Scheme is prejudicial to all the bona fide creditors of Kaseh and is an abuse of the process of this honourable court; and

(e) Kaseh's application made vide the ex parte originating summons herein is defective and irregular.

[4] The basis of the intervener's application to intervene is on the complaint that the scheme now proposed is essentially the same scheme that was proposed in the previous application before Court 5 which had lapsed because the Securities Commission had not approved it. In this present application the applicant had failed to disclose the terms of the consent order involving a large sum of RM19.4m recorded before Vincent Ng J (as he then was) on 11 August 2005.

[5] Counsel for the intervener points to a clause in the consent order which clearly says that for so long as the debt remains unpaid the applicant should not encumber the 50 million ordinary shares in Newco (LEKAS). This means that the applicant cannot take any steps to divest and or transfer the benefit of the interest in the concession to a third party. The applicant has failed to disclose the importance of this consent order without which the court would not be able to consider the applicant's ex parte application under s 176 justly and effectively.

[6] Counsel for the applicant submits that it is not the intention of the applicant to mislead the court and obtain the restraining order by stealth. Paragraph 31 of the supporting affidavit of the applicant's general manager did give particulars of legal actions instituted against the applicant a list of which was exhibited as 'MK–5' and 'MK–7' which gives particulars of the sums owed to the intervener under the terms of the consent order. The affidavit was affirmed on the advice of counsel who deemed it sufficient for the purpose as counsel was of the view that the intervener is in law to be treated as an unsecured creditor together with the other creditors mentioned in the list in exhs 'MK–5' and 'MK–7'.

[7] By the time this intervener's application is heard however, the ex parte order obtained by the applicant had lapsed thereby rendering it academic. It is nevertheless necessary for me to complete this judgment to send a message to aspiring future applicants under s 176 of the Companies Act 1965 that there is a duty on their part to disclose all material facts on clear and precise terms which may have a bearing on the decision of the court whether or not to grant a restraining order in the first place. As VC George J (as he then was) in *Re Kuala Lumpur Industries Bhd & Ors* [1990] 2 MLJ 180 said at p 182:

> In my view what must be available to the court when considering a s 176(10) application must be a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further the court has to be satisfied that there is or that there would be a bona.fide s 176(l) application.

[8] Having heard the parties, I am now convinced that the applicant had made this application purely with the intention of avoiding its obligation to the intervener

A under the consent order. It is not enough merely to provide the court with a list of secured or unsecured creditors without disclosing its obligation under the consent order. By doing so the applicant is guilty of withholding crucial information without which a just decision cannot be made on an ex parte basis. The applicant's application was therefore clearly an abuse of the power of the court.

B

[9] The affidavit of the General Manager, Mohd Khalid bin Mohamed supporting this application under s 176 did not specifically depose that the intervener was a substantial creditor who had bound the company by a consent order of the High Court obliging it to pay the judgment debt and that the said High Court order prevented the applicant from encumbering the applicant's shares in LEKAS which
C constitutes all or substantially all of its assets without having first to settle the debt owed to the intervener under the terms of the consent order. Needless to say such an omission constitutes contempt which the deponent of the affidavit must be made to answer.

D **[10]** Mohd Khalid bin Mohamed by his later affidavit explained that he is a layman who had been duly advised that it was sufficient to place the intervener in the same class as the other unsecured creditors as he had done in this case as the intervener is to be treated as an unsecured creditor. Although his explanation is unsatisfactory I do not consider it right to commit him for contempt for misleading the court.
E The responsibility lies with the directors and counsel. I must confess that in granting the ex parte order earlier I may have missed the point that the application had been supported merely by the affidavit of the general manager of the company and not by a responsible director or directors of the company. The counsel Encik Zachary Ivan Scully applying for the order did not bring to my notice that the application was supported only by the general manager. The omission on his part if intentional and
F calculated to deceive may by itself be the subject of a contempt proceeding. Needless to say any application by a company as important and serious as an application under s 176 of the Companies Act 1965 which involves matters of governance and policy of the company should not have been made by a mere employee but by a responsible director acting under a clear resolution of the board.

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[11] The applicant shall pay the intervener the costs of the intervener's application.

Application allowed.

H Reported by Brendan Navin Siva

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